



Federal Communications Commission
Washington, D.C. 20554

September 22, 2005

Ly S. Chhay, Esq.
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DOCKET FILE COPY ORIGINAL

Re: Motion to Accept Filing as Timely
Filed in MB Docket No. 05-255

Dear Ms. Chhay:

The Office of the Secretary has received your request for acceptance of the document filed by Cinnamon Mueller on behalf of the American Cable Association in the above-referenced proceeding as timely filed, due to technical difficulties with the Commission's Electronic Comment Filing System.

In accordance with 47 C.F.R. Section 0.231(i), I have reviewed your request and verified your assertions. After considering the relevant arguments, I have determined that these filings will be accepted as timely filed on September 19, 2005. If we can be of further assistance, please contact the Office of the Secretary.

Sincerely,

A handwritten signature in cursive script, reading "Marlene H. Dortch", is written over the typed name.

Marlene H. Dortch
Secretary

cc: Media Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

RECEIVED
SEP 20 2005
Federal Communications Commission
Office of the Secretary

In the Matter of)

Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)

MB Docket No. 05-255

To: The Commission)

Dated: September 20, 2005

MOTION TO ACCEPT LATE-FILED COMMENTS

On behalf of the American Cable Association ("ACA"), we file this Motion to
Accept Late-Filed Comments under 47 CFR § 1.46.

1. Comments were due in this proceeding on September 19, 2005.
2. On September 19, 2005 at 7:00 PM, the undersigned filed ACA's Comments on the Federal Communication Commission (FCC)'s Electronic Comment Filing System (ECFS) at http://gulfoss2.fcc.gov/prod/ecfs/upload_v2.cgi.
3. The ECFS system did not generate a confirmation of the filing.
4. On the morning of September 20, 2005, Emily Denney of Cinnamon Mueller called the ECFS Help Line to obtain confirmation that ACA's Comments were filed.
5. FCC personnel indicated that the FCC's ECFS website was unavailable from 6:30 P.M. on September 19, 2005 until 7:30 A.M. through September 20, 2005.
6. FCC personnel stated that because the ECFS system was unavailable when ACA tried to submit its Comments, ACA's Comments were not accepted and

ACA would need to resubmit its Comments with a Motion to Accept Late Filed-Comments.

7. We file ACA's Comments through the FCC's ECFS website today on September 20, 2005 along with this Motion.
8. Under 47 CFR § 1.46(a), the Commission will consider motions for acceptance of Comments made after the filing date.
9. Accepting ACA's Comments is in the public interest, as the Comments will provide a more complete and accurate record in this matter.
10. Accepting ACA's Comments will not prejudice any party to this proceeding, considering that ACA's Comments were timely filed but for a malfunction on the FCC's ECFS website and the Comments are only one day late.
11. For these reasons, we respectfully request that the Commission accept ACA's Comments as timely-filed.

Respectfully submitted,

_____/s/_____

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September 20, 2005

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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Federal Communications Commission
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Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

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MB Docket No. 05-255

To: The Commission



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September 19, 2005

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SUMMARY

From the perspective of small and medium-sized cable companies, these comments address five questions raised in the *Competition NOI*.

1. How does MVPD competition differ between rural/smaller markets and larger/urban areas?

The most significant competitive development in rural/smaller markets: DBS is now the dominant MVPD. The Leichtman Research Group has determined that DBS now leads cable in smaller markets by 5 percentage points. By contrast, in urban areas, big cable holds a four-to-one advantage.

For small and medium-sized cable companies, no factual basis exists for the perception of cable as a "monopoly gate-keeper." DBS dominates. To preserve and protect competition in smaller markets, the Commission and Congress must eliminate all vestiges of monopoly regulation imposed on small and medium-sized cable companies.

2. What additional costs and difficulties do smaller MVPDs face in securing satellite and broadcast programming?

In evaluating the competitive impact of access to programming, the Commission must consider both satellite and broadcast programming.

Wholesale programming practices of major satellite programming providers place small and medium-sized cable companies at a serious competitive disadvantage. ACA has provided the Commission with substantial information showing how major media conglomerates deal with small and medium-sized cable companies. In summary, to obtain "must have" channels, smaller MVPDs must: (i) distribute those channels on the first or second most widely penetrated tiers; (ii) distribute, and pay for, affiliated channels; and (iii) pay substantially higher fees than large MVPDs. To understand cable rate increases and why smaller MVPDs cannot offer more choices to consumers, the Commission needs to focus on wholesale programming practices.

At the core, current wholesale programming practices result in the following: Rural cable systems and their customers subsidize the programming costs of larger MVPDs, including the dominant MVPDs in rural markets, DirecTV and Echostar. No policy supports this perverse outcome.

New, substantial retransmission consent fees targeted at small and medium-sized cable companies will increase their competitive disadvantage. Any consideration of programming costs and cable rates must now include retransmission consent costs. When dealing with small and medium-sized cable companies, networks and major affiliate groups are demanding new monthly per subscriber fees ranging from \$0.50-\$1.00 and up for each network station. This will add \$2.50-\$5.00 or more per month to basic cable rates in smaller markets.

Because current law obligates cable companies to distribute broadcast signals on a basic tier to all subscribers, these fees mean that costs for all subscribers will increase. By contrast, DBS, the dominant rural MVPD, offers standalone, optional packages of broadcast channels.

3. How do the additional costs and difficulties in securing satellite and broadcast programming affect the ability of smaller MVPDs to compete?

Wholesale programming practices and retransmission consent practices hurt competition by increasing costs and decreasing choice.

This is not new territory for the Commission. The Commission has recognized that access to "must have" satellite and broadcast programming is critical to offering a competitive video product. When dealing with small and medium-sized cable companies, content owners are exploiting their market power through tie-ins, bundling, price discrimination, and, now, substantial new retransmission consent fees backed by threats of withdrawal. All this places small and medium-sized cable companies at a substantial competitive disadvantage when facing the dominant DBS providers and other much larger MVPDs.

4. Are smaller MVPDs seeking to offer themed tiers, and would the availability of themed tiers give consumers more choice and help control cable costs?

Many small and medium-sized cable companies want to offer themed tiers, a more family-friendly basic tier, and lower cost packages. The wholesale practices of the major content providers prevent this. To understand why smaller providers cannot offer more choices and better control cable costs, the Commission needs to focus on the wholesale market and on retransmission consent.

5. Do any statutes or regulations create an uneven playing field for the distribution of video programming?

Several regulatory and statutory changes are necessary to remedy current competitive imbalances in smaller markets. The top priority: Reform of broadcast signal carriage laws and regulations. Changes should include:

- Reform the retransmission consent regime as applied to small and medium-sized cable companies. The *ACA Petition for Rulemaking* provides a limited, narrowly tailored reform proposal.
- Permit small and medium-sized cable companies to offer broadcast channels in standalone, optional packages, just like DBS.
- Entitle small, rural cable systems to have nondiscriminatory access to local-into-local signals when they cannot obtain a good quality signal off-air.

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Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

To: The Commission

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MB Docket No. 05-255



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September 19, 2005

I. INTRODUCTION

From the perspective of small and medium-sized cable companies, these comments respond to the following five questions raised in the *Competition NOI*:¹

- How does MVPD competition differ between rural/smaller markets and larger/urban areas?
- What additional costs and difficulties do smaller MVPDs face in securing satellite and broadcast programming?
- How do the additional costs and difficulties in securing satellite and broadcast programming affect the ability of smaller MVPDs to compete?
- Are smaller MVPDs seeking to offer themed tiers, and would the availability of themed tiers give consumers more choice and help control cable costs?
- Do any statutes or regulations create an uneven playing field for the distribution of video programming?

Elsewhere, ACA and others have provided the Commission with substantial information to help answer these questions, and we refer to those filings throughout. We ask that the Commission incorporate those filings into the record of this proceeding.²

The American Cable Association. ACA represents nearly 1,100 small and medium-sized cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-

¹ *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 05-255, 2005 WL 1939218 (2005) ("*Competition NOI*").

² We attach as Exhibit 1 a list of pertinent filings.

run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets. All ACA members must deal with media conglomerates to acquire satellite and broadcast programming.

II. ANALYSIS

A. The principal competitive development in smaller markets is that lightly regulated DBS is now the dominant MVPD.

The *Competition NOI* requests information on how competition differs in smaller markets compared to larger, urban markets.³ The most significant development: DBS is now the dominant MVPD in smaller markets. According to Leichtman Research Group:

Rural areas nationwide now have more Direct Broadcast Satellite (DBS) subscribers than cable subscribers. Forty two percent of individuals who define themselves as living in a rural area report that they subscribe only to DBS; 37% to cable only; and 2% to both cable and DBS. In a similar study last year, 38% in rural areas said that they subscribe to DBS only, and an equal percentage to cable only.

While DBS has made recent gains in urban and suburban areas, cable still has nearly a 4:1 subscriber advantage in these areas. Of those nationwide who identify themselves as living in an urban or suburban area, 63% report that they subscribe only to cable.⁴

This development should come as no surprise. ACA has repeatedly explained to the Commission how DBS has benefited from far lighter regulatory burdens and costs

³ *Competition NOI* at ¶ 23.

⁴ Leichtman Research Group, Inc., *DBS Now the Leading Video Provider in Rural America*, Research Notes, at 3-4 (2Q 2005), at http://www.leichtmanresearch.com/research/notes06_2005.pdf.

than its much smaller competitors.⁵ Many of the regulatory burdens and costs borne by small and medium-sized cable companies are legacies from when cable was perceived as a "monopoly gate-keeper." Today, for small and medium-sized cable companies, no factual basis exists for this perception. DBS dominates smaller markets. To preserve and protect competition, the Commission must act to fix regulatory disparities within its jurisdiction and recommend that Congress do the same with the Communications Act.

Broadcast signal carriage reform must be the top priority. For example, under current law, small and medium-sized cable companies must offer broadcast signals on a basic tier received, and paid for, by all customers.⁶ In contrast, the dominant DBS providers offer broadcast signals as standalone, optional packages.⁷ Especially now that the networks and major affiliates groups seek to charge small and medium-sized cable companies substantial fees for retransmission consent, this disparity has developed into a major competitive disadvantage, and ensures that rural cable consumers will face substantially higher basic rates. This will either increase the costs of cable or incent more consumers to switch to DBS – solely due to statutory and regulatory disparities. Section II.E. contains other examples.

To preserve and protect competition in small and rural markets, the Commission and Congress must act expeditiously to remove all vestiges of legacy monopoly

⁵ See, e.g., *In re Consolidated Application of EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation For Consent to Transfer Control*, CS Docket No. 01-348, American Cable Association, Petition to Deny (filed February 4, 2002) at 18-20; *In re Consolidated Application of General Motors Corporation, Hughes Electronics Corporation and The News Corporation For Consent to Transfer Control*, MB Docket No. 03-124, Comments of the American Cable Association (filed June 16, 2003) ("ACA News Corp. Comments") at 21.

⁶ 47 U.S.C. §§ 534(b), 543(b)(7); 47 C.F.R. §§ 76.56(b), 76.901.

⁷ 47 U.S.C. § 338(d); 47 C.F.R. § 76.66(i).

regulations as applied to small and medium-sized cable companies.

- B. While attempting to compete with DBS, small and medium-sized cable companies face substantial discrimination in prices, terms and conditions for access to "must have" satellite and broadcast programming.**

The *Competition NOI* seeks information on the cost of programming, how those costs vary among classes of competitors, and how those costs differ for small and medium-sized cable operators.⁸ To evaluate fully how programming practices and costs affect competition, the Commission must evaluate two classes of programming – satellite-delivered programming and broadcast programming. From this inquiry, the Commission will see that in acquiring satellite and broadcast programming, small and medium-sized cable companies face substantial discrimination in prices, terms and conditions. This discrimination increases costs, decreases choices for consumers, and hurts the ability of smaller providers to compete.

- 1. To obtain access to "must have" satellite programming, small and medium-sized cable companies must agree to tie-ins and substantially higher fees.**

Concerning access to satellite programming, ACA has provided the Commission with substantial information showing how major media conglomerates deal with small and medium-sized cable companies.⁹ Mediacom Communications Corporation has also filed a detailed description of wholesale programming practices and their

⁸ *Competition NOI* at ¶¶ 17, 23.

⁹ *Inquiry Concerning A La Carte, Themed Tier Programming and Pricing, Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the American Cable Association (filed July 12, 2004) ("ACA Programming Report Comments") at 5-7, 9-14, 21, 25, 34-36, 40; Testimony of Ben Hooks, CEO of Buford Media Group, *Symposium on the Commission's Inquiry Concerning A La Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207 (July 29, 2004) ("Hooks Testimony") at 2-7, 9-10.

consequences.¹⁰ In summary, to obtain "must have" channels, smaller MVPDs must: (i) distribute those channels on the first or second most widely penetrated tiers; (ii) distribute, and pay for, affiliated channels; and (iii) pay substantially higher fees than large MVPDs.¹¹ To understand cable rate increases and why smaller MVPDs cannot offer more choices to consumers, the Commission needs to focus on wholesale programming practices. The answers are there.

Concerning price discrimination, ACA has provided estimates that the dominant media conglomerates charge smaller MVPDs programming rates that are between 30% to 55% higher than rates paid by larger MVPDs.¹² While programmers seek to hide the magnitude of the disparity, it becomes readily apparent when a smaller MVPD acquires a cable system from a major MSO. In those cases, on the day of closing, programming costs for the acquired system jump, solely due to price discrimination against smaller providers. As reported to the Commission:

While programming costs increased on the day of closing, it is important to understand what did not change. Delivery costs did not change – the same headends received the same satellite signals as before. Administration costs did not change – the smaller operator continued to pay monthly programming fees through the National Cable Television Cooperative and programmers were paid directly, and on time, by NCTC. The only discernable change was the lack of market power of the smaller cable company compared to its major MSO predecessor. And for this reason, wholesale rates increased. . . .¹³

¹⁰ *In the Matter of 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 02-277, Reply Comments of Mediacom Communications Corporation (filed February 4, 2003) ("*Mediacom Media Ownership Reply*") at 55-75.

¹¹ *ACA Programming Report Comments* at 5-7, 9-14, 21, 25, 34-36, 40; *Mediacom Media Ownership Reply* at 42-45, 55-75, 82-84.

¹² *ACA Programming Report Comments* at 39.

¹³ *Id.*

The Commission's *Programming Report* acknowledged that wholesale programming practices described by ACA and others "may cause harms in the market for video programming [that] may carry through to the retail market and adversely affect consumers."¹⁴ Still, despite the substantial evidence provided by ACA, the *Programming Report* stopped there.

In this proceeding, the Commission must extend the inquiry. To answer the questions raised in the *Competition NOI*, the Commission must examine the adverse affects of wholesale programming practices on competition in smaller markets. In doing so, the Commission will see that programming price discrimination, tie-ins, and forced bundling raise costs and reduce choices for consumers and harm the ability of smaller distributors to compete. At their core, current wholesale programmer practices result in the following: Rural cable systems and their customers subsidize the programming costs of larger MVPDs, including the dominant MVPDs in rural markets, DirecTV and Echostar. No policy supports this perverse outcome.

And with retransmission consent, it gets worse.

2. To obtain access to "must have" broadcast programming, small and medium-sized cable companies now face demands for substantial retransmission consent fees.

Any consideration of programming costs and cable rates must now include retransmission consent costs. When dealing with small and medium-sized cable companies, networks and major affiliate groups are demanding new monthly per subscriber fees ranging from \$0.50-\$1.00 and up for each network station. This will add

¹⁴ *Report on the Packaging and Sale of Video Programming Services to the Public*, Media Bureau, MB Docket No. 04-207 (Nov. 18, 2004) ("*Programming Report*") at ¶ 80.

\$2.50-\$5.00 or more per month to basic cable rates in smaller markets. A recent filing by the National Cable Television Cooperative, the cooperative buying group for the small cable sector, describes the game broadcasters are playing with smaller distributors:

The price for retransmission consent is rising so sharply because broadcasters and networks are using regulations and contracts to impede marketplace pricing. The disparity in market power between broadcasters and smaller cable companies makes smaller cable companies "low hanging fruit" for this strategy.

* * *

Without some changes, retransmission consent "pricing" could easily cost smaller cable companies and their consumers more than an additional \$1 billion over the next three years. This will hurt consumers and limit competition.¹⁵

In short, media conglomerates are now using broadcast licenses and exclusivity to squeeze more and more pure profit from smaller distributors and rural consumers.

In MB Docket No. RM-11203, ACA and others have provided the Commission with substantial information on the significant financial impact of these retransmission consent practices.¹⁶ As shown in the *ACA Petition* and in the comments of more than 70 diverse companies and organizations, powerful broadcast groups are using

¹⁵ Letter from Mr. Michael L. Pandzik, President and CEO of the National Cable Television Cooperative, Inc., MB Docket No. RM-11203 (filed April 15, 2005) ("*NCTC Letter*") at 2-3.

¹⁶ American Cable Association Petition for Rulemaking, *In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, MB Docket No. RM-11203 (filed Mar. 2, 2005) ("*ACA Petition*"); MB Docket No. RM-11203, Reply Comments of the American Cable Association (filed May 3, 2005) ("*ACA Petition Reply*"); MB Docket No. RM-11203, American Cable Association, Notice of Ex Parte Presentation (filed May 23, 2005); *NCTC Letter* at 2; Comments of Block Communications, MB Docket No. RM-11203 (filed April 18, 2005) ("*Block Comments*") at 4-5; Comments of Atlantic Broadband Finance, LLC, MB Docket No. RM-11203 (filed April 18, 2005) at 1, 12; Comments of Mediacom Communications & Cebridge Connections, MB Docket No. RM-11203 (filed April 18, 2005) at 6, 12-23; Comments of Millennium Digital Media Systems, LLC, MB Docket No. RM-11203 (filed April 18, 2005) at 4-5, 6-7.

retransmission consent and exclusivity to raise costs for smaller MVPDs. NCTC describes the certain outcome of broadcasters' campaign to charge smaller distributors new substantial fees:

Broadcasters have expressed plans to escalate dramatically the "price" for retransmission consent, and are targeting smaller cable companies for higher cash demands, which would add several dollars per month to the cost of the basic tier. . . . Without the adjustments proposed by ACA, consumers served by smaller distributors will either (i) pay sharply higher basic cable rates or (ii) face the very real prospect of losing access to network stations. This will truly be a crisis in rural America, and no public policy supports it.¹⁷

In MB Docket RM-11203, ACA proposes specific, narrowly-tailored, adjustments to the regulations that would help alleviate some of the financial pressure of retransmission consent on smaller MVPDs and their customers. These adjustments are fully consistent with the retransmission consent laws, the cable copyright laws, and the intent and purpose of the Commission's broadcast signal carriage regulations. Moreover, the changes requested by ACA would affect cable companies serving no more than 8% of U.S. television households. ACA's requested changes would fall far short of having any material effect on the broadcast industry, while having a significant beneficial impact on competition in smaller markets.

To answer fully and fairly the questions raised in the *Competition NOI* concerning cost, choice and competition in smaller markets, the Commission must incorporate the information provided by ACA and others regarding wholesale programming practices and retransmission consent.

¹⁷ NCTC Letter at 1.

- C. **In markets served by small and medium-sized cable companies, competition is harmed by programmers' and broadcasters' price discrimination, tie-ins, forced bundling and spiraling retransmission consent fees.**

The *Competition NOI* asks how current program access and pricing practices affect competition.¹⁸ For small and medium-sized cable companies facing the two national DBS companies, the short answer is: Wholesale programming practices and retransmission consent practices hurt competition by increasing costs and reducing choice.

This is not new territory for the Commission. The Commission has consistently found that access to "must have" satellite and broadcast programming is critical for MVPD competition.¹⁹ It should come as no surprise that media conglomerates exploit this market power when dealing with smaller distributors.

Concerning broadcast programming, the Commission recently examined the competitive impact of just the *threat* of temporary withdrawal of network stations.²⁰ The Commission concluded "that carriage of local television broadcast station signals is critical to MVPD offerings," and broadcast groups have substantial market power.²¹ The Commission then applied this analysis to retransmission consent dynamics.

¹⁸ *Competition NOI* at 17, 23.

¹⁹ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290, 17 FCC Rcd. 12,124 (2002) ("Program Access Order") at ¶¶ 33-34; *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) ("News Corp. Order") at ¶¶ 176, 202.

²⁰ *News Corp. Order* at ¶¶ 176, 202, 204.

²¹ *News Corp. Order* at ¶ 202.

[T]he ability of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers.²²

The Commission also recognized that small and medium-sized cable companies are “low hanging fruit” for this strategy.

[S]mall and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for “must have” programming. . . .²³

Broadcasters rail against any reference to the retransmission consent analysis in the *News Corp./DirecTV Order*, because they claim it is limited to only that transaction.²⁴ This ignores the staff’s careful study of retransmission consent dynamics generally, before focusing on transaction specifics. “[T]he ability of a television broadcast station to threaten to withhold its signal . . .” obviously applies to all network stations, not just those controlled by News Corp.

Despite the Commission’s analysis of the harm to competition and consumers, many broadcasters now view the extraction of supra-competitive retransmission consent prices from smaller entities as an inalienable right.²⁵ In the face of corporate greed of this magnitude, the Commission and Congress must act to protect competition and consumers.

²² *News Corp. Order* at ¶ 204.

²³ *News Corp. Order* at ¶ 176.

²⁴ Comments of National Association of Broadcasters, MB Docket No. RM-11203 (filed April 18, 2005) (“*NAB Comments*”) at 3, 4; Joint Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket No. RM-11203 (filed April 18, 2005) (“*NBC Comments*”) at 17-18; Comments of Pappas Telecasting Companies, MB Docket No. RM-11203 (filed April 18, 2005) (“*Pappas Comments*”) at 7-8.

²⁵ See, e.g., *NAB Comments* at 2, 9-11; *NBC Comments* at 13.

In the *SHVERA Report*, the Commission concluded that the record in that proceeding did not contain sufficient information to warrant recommending changes to Congress, and deferred to this proceeding.²⁶ By incorporating here the pertinent filings of ACA and others, the Commission will have ample information to conclude how wholesale programming practices and retransmission consent practices are harming the ability of smaller MVPDs to compete.

- D. To provide better service to consumers and to enhance competition, many small and medium-sized cable operators desire to offer themed tiers and a lower cost, more family-friendly expanded basic tier, but major programming providers prevent it.**

The *Competition NOI* seeks comment on to what extent MVPDs are offering consumers more choice through themed tiers and other types of program packaging.²⁷ For the small cable sector, ACA's comments and testimony in MB Docket 04-207 provide substantial information on this question. In short, many ACA members want to offer theme tiers, lower cost packages, and a more family-friendly expanded basic tier. Wholesale programming practices and retransmission consent practices of the media conglomerates prevent it.

We quote from ACA's comments and testimony:

To gain access to "must have" programming and local network broadcast stations, smaller cable operators must acquiesce to distribution restrictions, bundling, and tie-ins. These practices eliminate flexibility in local packaging of programming.²⁸

²⁶ *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant To Section 208 of The Satellite Home Viewer Extension And Reauthorization Act of 2004*, 2005 WL 2206070 (2005) ("*SHVERA Report*") at ¶ 76.

²⁷ *Competition NOI* at ¶ 16.

²⁸ *ACA Programming Report Comments* at 6.

* * *

Many ACA members report that if they were permitted to move costly sports services to a tier, they would do so as soon as possible. In their markets, more customers would prefer a lower cost expanded basic package and less sports programming.²⁹

* * *

[I]n some ACA member markets, many customers find objectionable the content carried on certain music video channels and entertainment channels that carry mature programming. These channels carry partial nudity, sexually suggestive content, and profanity. In certain markets, ACA members would move these services to a "Contemporary Adult Tier" or similarly labeled tier. This would reduce wholesale costs for expanded basic, ease retail rate pressure, and address content concerns in markets where those concerns are pervasive.³⁰

* * *

When we boil it all down, that is the essence of ACA's input here. The exercise of market power by a few media conglomerates limits our ability to provide our customers more choice and raises costs. We want to provide more choice and better value. We can't.³¹

At the symposium that preceded the *Programming Report*, Ben Hooks, President of Buford Media Group, described in detail how major program suppliers prevent his company from offering more choices to consumers:

For nearly all the Top 50 channels, contracts require me to deliver each channel to all or nearly all of our customers. Everybody must receive these channels and, of course, pay for them. If I don't agree to do that, I do not get the channel.

²⁹ *Id.* at 24.

³⁰ *Id.* at 25.

³¹ *Hooks Testimony* at 2.

For many of the Top 50 channels, contracts require me to distribute, and pay for, affiliated channels. In some cases, this involves several additional channels. In some cases, the tie-in is mandatory. In other cases, the tie-in is coerced. For example, if I do not carry the affiliated channel, I pay double, or more, for the "must have" channel.

All this combines to fill up our basic or expanded basic service with channels controlled by a few companies. But it doesn't stop there. Now that many smaller cable systems are upgrading to digital, the same game is being played there.

* * *

Initially, smaller cable operators had some choices in how they purchased and packaged digital channels. We could offer theme tiers, for example. That was good. But now, the contracts are changing. Increasingly, we are being obligated to distribute Second Tier channels to all digital customers. This is undermining what little flexibility we had.³²

In one paragraph, the *Programming Report* acknowledged that wholesale programming practices "may cause harms" and may adversely affect consumers.³³ The *Programming Report* stopped there. It did not delve into how many small and medium-sized cable companies desire to offer more programming choices at lower costs, and how wholesale programming and retransmission consent practices prevent them from doing so.

To answer the questions raised in the *Competition NOI*, ACA's comments for the *Programming Report* are on point. We respectfully request that Commission incorporate this information into its report from this proceeding.

³² *Id.* at 5-6.

³³ *Programming Report* at 80.

- E. **To level the playing field in markets served by small and medium-sized cable companies, the Commission and Congress must reform the broadcast signal carriage laws and regulations.**

The *Competition NOI* asks if any statutes or regulations create an uneven playing field for the distribution of video programming.³⁴ For small and medium-sized cable companies, we identify three areas of significant concern:

- The current retransmission consent regime;
- The requirement to carry broadcast signals on basic; and
- Lack of nondiscriminatory access to local-into-local signals.

Each of these legal and regulatory *disparities* places smaller MVPDs at a significant competitive disadvantage to DBS. When the effects are combined, it should come as no surprise that the two lightly regulated DBS providers now dominate rural markets.

1. **Reform of the current retransmission consent regime is critical to preserving competition between smaller MVPDs and DBS.**

As discussed in Section II.B.2, broadcasters are targeting small and medium-sized cable companies for unprecedented retransmission consent fees. Parties including the National Cable Television Cooperative estimate that new retransmission consent fees will add at least \$1 billion to the cost of basic cable for the small cable sector.³⁵

Substantial new retransmission consent fees targeted at smaller MVPDs will further hurt their ability to compete with DBS. Because cable operators are required to deliver broadcast signals to all subscribers, retransmission consent fees raise costs and

³⁴ *Competition NOI* at ¶ 10.

³⁵ *NCTC Letter* at 2; *Block Comments* at 4-5.

rates for *all* cable subscribers. In contrast, DirecTV and EchoStar can offer standalone, optional broadcast tiers, so that only those customers that want to pay for broadcast channels must do so.

The *ACA Petition* proposes specific, narrowly-tailored, adjustments to the regulations that would help alleviate some of the financial pressure on small and medium-sized cable companies.³⁶ As proposed in the *ACA Petition*, these changes would affect cable systems serving no more than 8% of all US television households.³⁷ Still, NAB, Disney, NBC and other broadcast interests vehemently oppose the proposed changes, claiming a range of awful outcomes that would result from the limited adjustments proposed by ACA.³⁸

The *SHVERA Report* expresses concern that changes to broadcast signal carriage laws and regulations could adversely impact localism as well.³⁹ But broadcaster cash demands will thrust a more immediate question before policymakers and the industry:

How is localism served in smaller markets when broadcaster demands for substantial new retransmission consent fees raise basic cable rates by several dollars per month?

³⁶ *ACA Petition* at 33-35, Exhibit A.

³⁷ *ACA Petition* at 35.

³⁸ *NAB Comments* at 19 (ACA's proposals "could effectively destroy local program exclusivity by allowing a few stations to cannibalize other stations' markets"); *NBC Comments* at 2 (ACA's proposals "would harm local stations, upend the level playing field...between local stations and cable programming networks"), 6-12, 15 ("These grants of exclusive rights within a limited geographical area serve the public interest by avoiding intrabrand cannibalism within the served territory..."); *Pappas Comments* at 9 ("Under the proposed rules, network affiliation agreements...would now be eliminated, leading to the real possibility that network programming will become...a Starbucks on every corner.").

³⁹ *SHVERA Report* at ¶ 50.

Absent change, the Commission must contend with this question in the very near future.

In the meantime, for purposes of this proceeding, the current retransmission consent regime is one key source of competitive disadvantage for small and medium-sized cable companies. The changes proposed in the *ACA Petition* would help alleviate that.

2. As with DBS, the Commission and Congress must allow small and medium-sized cable companies to offer broadcast channels in standalone, optional packages.

The requirement to deliver broadcast signals to all customers places small and medium-sized cable companies at a major disadvantage to DBS. The Cable Act and Commission regulations mandate broadcast signals on a basic tier that is distributed to all subscribers.⁴⁰ By contrast, DBS providers are entitled to offer standalone, optional broadcast packages.⁴¹

As a result, when a broadcaster like Hearst-Argyle, demands that a small cable operator pay \$0.60 per subscriber per month for carriage of a local station, the cost is imposed on *all* subscribers.⁴² By contrast, even if Hearst-Argyle set the same price for DBS providers (and we believe broadcasters are charging the major DBS providers much lower fees than small MVPDs), the DBS providers pay for only those subscribers that expressly order the broadcast package.

⁴⁰ 47 U.S.C. §§ 534(b), 543(b)(7); 47 C.F.R. §§ 76.56(b), 76.901.

⁴¹ 47 U.S.C. § 338(d); 47 C.F.R. § 76.66(i).

⁴² ACA members report that Hearst-Argyle is demanding retransmission consent fees of \$0.50 – 0.60 per subscriber for all Hearst-Argyle stations, regardless of market, network affiliation or ratings.

As a result, small and medium-sized cable companies cannot offer comparable packages and prices. Current law and regulations, combined with broadcaster cash demands, places smaller cable providers at a structural disadvantage to DBS.

The *SHVERA Report* recognizes this situation but overlooks the clear competitive impact in rural markets.⁴³ This proceeding should address this disparity and recommend that it be changed, especially in light of DBS's dominance in rural markets and new broadcaster cash demands. Like the DBS providers, small and medium size cable operators should be able to offer customers the opportunity to purchase local broadcast stations in a standalone, optional package.

3. Congress and the Commission must establish nondiscriminatory access to satellite-delivered broadcast signals for rural cable systems.

A third regulatory disparity also involves delivery of broadcast signals. In some rural markets, small systems are so remote from broadcast transmitters that the systems cannot pick up good quality signals over the air. It follows that what these cable systems cannot receive, they cannot distribute to customers.

As a result, an estimated 1 million rural consumers cannot receive a full complement of good quality local broadcast signals, solely because they live in remote regions. In response to an ACA member poll on this issue, over 100 companies indicated that they could provide better quality local broadcast signals to their customers if they were permitted to access satellite-delivered broadcast signals.

Increasingly, these small systems are becoming part of local-into-local markets.

⁴³ *SHVERA Report* at ¶ 14.

Now, one or both DBS providers can deliver clear local broadcast signals, regardless of distance from a transmitter site. The competitive implications are self-evident. Not only can the DBS providers deliver local signals, but they deliver good quality local signals that some rural cable systems cannot.

A readily available, low-cost solution already exists. Rural cable systems can receive good quality local broadcast signals delivered via satellite and retransmit those signals to customers. All that is required is the consent of the DBS providers. DirecTV and EchoStar refuse to provide that consent.

The small cable sector has attempted to reach a marketplace solution on this issue. The National Cable Television Cooperative has repeatedly asked EchoStar and DirecTV to negotiate terms and conditions of access to local-into-local signals. EchoStar and DirecTV have refused.

To be clear, ACA does not ask for these signals for free. We are asking for access on nondiscriminatory prices and terms. A marketplace for measuring these prices and terms already exists. Both EchoStar and DirecTV have active businesses in wholesaling their signals to MDUs, complexes, universities and other enterprises. These transactions provide a ready benchmark to protect against anticompetitive conduct.

The *SHEVRA Report* declined to recommend this solution to Congress. Instead, the Commission suggested that small rural systems could instead use fiber optic links, microwave, or fixed satellite.⁴⁴ These technologies will not help. Few small systems can support the cost; those that can already employ them.

⁴⁴ *SHVERA Report* at ¶ 83.

With evidence now before the Commission that DBS is the dominant provider in rural markets, the analysis should change. To foster efficient dissemination of good quality broadcast signals, and to level the playing field between the two DBS providers and small rural cable systems, the Commission should adopt a policy of requiring nondiscriminatory access to local-into-local signals as proposed by ACA.⁴⁵

III. Conclusion

By incorporating into this proceeding the substantial information provided by ACA and others, the Commission can describe more completely the current state of video competition, especially for markets served by small and medium-sized cable companies. That description should include the following:

- DBS is now the dominant video provider in smaller markets.
- Wholesale programming practices increase costs and reduce choice, especially for consumers served by small and medium-sized cable companies.
- Many small and medium-sized cable companies desire to offer themed tiers, lower cost packages, and a more family-friendly expanded basic tier; wholesale programming practices of the major media conglomerates prevent it.
- Networks and major affiliate groups are demanding that small and medium-sized cable companies pay new, substantial fees for retransmission consent. This will raise the cost of basic cable \$2-\$5 or more per month.
- Wholesale programming practices and retransmission consent practices place small and medium-sized cable companies at a serious competitive disadvantage to DBS and other larger MVPDs.

⁴⁵ *Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, MB Docket No. 05-28, Comments of the American Cable Association (filed March 1, 2005) at 6-7.

Several regulatory and statutory changes can help level the competitive playing field in smaller markets. These include:

- Reform the retransmission consent regime as applied to small and medium-sized cable companies. *The ACA Petition* provides a limited, narrowly tailored reform proposal.
- Permit small and medium-sized cable companies to offer broadcast channels in standalone, optional packages, just like DBS.
- Grant small, rural cable systems nondiscriminatory access to local-into-local signals when they cannot obtain a good quality signal off-air.

These changes will help alleviate the current disparities between DBS and its smaller competitors and will preserve and protect competition in smaller markets.

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ACA Comments MB Docket 05-255.doc

Exhibit 1

Pertinent filings in other proceedings

American Cable Association Petition for Rulemaking, In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, MB Docket No. RM-11203 (filed Mar. 2, 2005).

In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, MB Docket No. RM-11203, Reply Comments of the American Cable Association (filed May 3, 2005)

In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, MB Docket No. RM-11203, Letter from Mr. Michael L. Pandzik, President and CEO of the National Cable Television Cooperative, Inc. (filed April 15, 2005).

In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, MB Docket No. RM-11203, Comments of Block Communications (filed April 18, 2005).

In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, MB Docket No. RM-11203, Comments of Atlantic Broadband Finance, LLC (filed April 18, 2005).

In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, MB Docket No. RM-11203, Comments of Mediacom Communications & Cebridge Connections (filed April 18, 2005).

In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, MB Docket No. RM-11203, Comments of Millennium Digital Media Systems, LLC (filed April 18, 2005).

Inquiry Concerning A La Carte, Themed Tier Programming and Pricing, Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, MB Docket No. 04-207, Comments of the American Cable Association (filed July 12, 2004).

Symposium on the Commission's Inquiry Concerning A La Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, MB Docket No. 04-207, Testimony of Ben Hooks, CEO of Buford Media Group (July 29, 2004).

In the Matter of 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket 02-277, Reply Comments of the American Cable Association (filed February 3, 2003).

In the Matter of 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket 02-277, Reply Comments of Mediacom Communications Corporation (filed February 4, 2003).

In re Consolidated Application of General Motors Corporation, Hughes Electronic Corporation, and The News Corporation, For Consent to Transfer Control, MB Docket No. 03-124, Comments of the American Cable Association (filed June 16, 2003).

In re Consolidated Application of General Motors Corporation, Hughes Electronic Corporation, and The News Corporation, For Consent to Transfer Control, MB Docket No. 03-124, Reply Comments of the American Cable Association (filed July 1, 2003).

In re Consolidated Application of General Motors Corporation, Hughes Electronic Corporation, and The News Corporation, For Consent to Transfer Control, MB Docket No. 03-124, American Cable Association, Notice of Ex Parte Presentation (filed October 17, 2003).

In the Matter of Petition for Inquiry into Retransmission Consent Practices, American Cable Association, Proceeding PRM02MB (filed October 1, 2002).